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No. 94-991

In The

Supreme Court of the United States

October Term, 1994

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, and VERNIE RHODES, JR.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

On December 1, 1994, Petitioner filed with this Court its Petition for Writ of Certiorari to the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on September 2, 1994. The Petitioner presents the question of whether the Employee Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, preempts a state law claim that former employees were fraudulently induced to accept an ERISA-qualified severance plan where, although the state law is a law of general application, liability under the state law depends upon the ERISA plan and the claim conflicts with the

plan's waiver provisions. Since the Petition was filed, recent authority that could affect this Court's consideration of this case, but which was not cited in the Petition or in Respondent's Brief in Opposition, has come to Petitioner's attention. Specifically, the Fifth Circuit's recent opinion in *Hook v. Morrison Milling Company*, 38 F.3d 776 (5th Cir. 1994), has a number of significant implications with respect to the instant Petition:

1. The decision in *Hook* underscores the continuing conflict in the lower courts, which should be resolved by this Court, with respect to the application of *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) and *FMC Corp. v. Holliday*, 498 U.S. 52 (1992) to state laws of general application.

In *Hook*, the Fifth Circuit held that an employee's negligence claim against her employer was not preempted by ERISA even though the employer's ERISA plan included a waiver of her right to sue for injuries arising out of her employment. Distinguishing *McClendon* and *FMC Corp.*, the majority concluded that Hook's unsafe workplace claim was "totally independent" from the ERISA plan (*Hook*, 38 F.3d at 784) and that, despite the existence of the waiver, her claim would exist "whether or not [her employer] had established an ERISA plan." *Id.* at 782.

In so ruling, the majority in *Hook* expressly disagreed with the Sixth Circuit's analysis in *Van Camp v. AT & T*, 963 F.2d 119 (6th Cir.), *cert denied*, 113 S.Ct. 365 (1992), another case involving the issue presented here. *Id.* at 785. In *Van Camp*, an employee who refused to be reassigned was given the option of early retirement or a

demotion. The employee chose to retire and signed a statement indicating that he was retiring voluntarily and that his choice of early retirement under the employer's ERISA pension plan was irrevocable. The employee later sued the employer, alleging that his choice was coerced and that the employer had violated state law in forcing his retirement. The Sixth Circuit reasoned that "the determination of whether the employer's ERISA plan was valid became the 'fulcrum' upon which the case turned." *Id.* at 123. The court held that an evaluation of the employee's claim necessarily involved a determination of the validity of the plan's wavier and, therefore, came within ERISA's preemptive sweep. *Id.* The Sixth Circuit noted that its determination was consistent with this Court's holding in *McClendon*. Despite the similarities between the two cases, the Fifth Circuit in *Hook* declined to follow the reasoning in *Van Camp*, thus illustrating the inconsistent approaches taken by the courts below in their attempts to work through the labyrinth of ERISA preemption law.

2. *Hook* also demonstrates the dissension that exists even among appellate judges in the same federal circuit. In a strong dissenting opinion, Judge Jones wrote that, in light of this Court's holdings in *McClendon* and *FMC Corp.*, a court cannot overlook the existence of a waiver contained in an ERISA plan that "squarely conflicts" with a state law claim. *Hook*, 38 F.3d at 787. To do so, Judge Jones reasoned, would be "like a borrower's accepting money under a promissory note and asking the court to ignore its reference to a security agreement." *Id.* Relying on the breadth of ERISA's preemption provision and *FMC Corp.*, Judge Jones concluded that "Hook's claim directly

draws into question the enforceability of the plan's waiver of right to sue" and is thus preempted. *Id.*[1]

3. The Fifth Circuit's recent ruling, with its criticism of the Sixth Circuit's analysis and its strong and thoughtful dissent grounded in this Court's precedent, underscores the timeliness and importance of the issue in the instant case. Even while this Petition is pending, the courts below are continuing to choose different sides of a line which this Court chose not to draw. *Shaw v. Delta Air Lines Inc.*, 463 U.S. 85, 100 n. 21 (1983) (expressing "no views about where it would be appropriate to draw the line" between those claims which are too tenuous or remote to warrant preemption and those that are not). The instant case provides this Court with an opportunity to settle an important question of federal law[2] and end a series of inconsistent holdings which undermine the fundamental policy behind ERISA – to provide a uniform body of benefits law. *McClendon*, 498 U.S. at 142.

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[1] As Judge Jones further observed: "In *FMC Corp.*, the injured ERISA beneficiary surrendered his right to sue free of subrogation rights to the ERISA plan, whereas in this case, the injured party has ostensibly surrendered her right to sue for work-related injuries. None of the cases cited by the majority concerning the nature or extent of an 'ERISA relationship' for purposes of preemption analysis is relevant here; Hook's claim directly draws into question the enforceability of the plan's waiver of right to sue." *Hook*, 38 F.3d at 787.

[2] The Fifth Circuit saw this question as such an important issue that they requested an amicus brief from the United States Department of Labor, the agency with primary responsibility for enforcing employee benefit rights. *Hook*, 38 F.3d at 779, 786 n. 13.

For the foregoing reasons, and those set forth in the Petition, a writ of certiorari should be granted.

Dated: January 6, 1995

Respectfully submitted,

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